89-1152

Supreme Court, U.S.
FILED
JAN 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHN CARY,
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether due process is offended where the trial court declares a mistrial over the objection of a defendant and thereby twice places the defendant in jeopardy for the same offense:

1) Where "manifest necessity" did not exist;

2) Where the defendant waived any potential prejudice; and

3) Where the trial court failed to consider proposed curative alternatives.

LIST OF PARTIES
IN APPELLATE COURT

John Cary

Pedro Talamas

Hiram Lee Bauman,

Appellants,

United States of America,

Appellee

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REFERENCE TO OPINIONS TO LOWER COURT

The opinion of the Fifth Circuit Court of Appeals, the order denying Rehearing, and the District Court's Order Granting Mistrial are all reproduced in the appendix.

JURISDICTION

The Court of Appeals had appellate jurisdiction over the district court's final judgment in this criminal case, pursuant to 28 U.S.C. § 1291. The panel's order was entered on October 20, 1989. See A-6. The Petitioner's Suggestion for Rehearing En Banc was timely filed on November 3, 1989. Upon treatment of the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, it was denied on November 21, 1989. See A-3. Consistent with this Honorable Court's Rule 13, this Petition is timely filed.

This Court's jurisdiction in the instant case is based on 28 U.S.C. § 1254(1), and United States Supreme Court Rule 10.

CONSTITUTIONAL PROVISION AT ISSUE

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states:

> "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to the indictment filed in the United States District Court for the Southern District of Texas, Houston Division. References herein shall be made to the transcript record of the trial and hearing on Motion to Dismiss, by the designation "TR".

On April 15, 1987, the Petitioner was indicted, by a federal grand jury, charging him with conspiracy to import a Schedule II controlled substance, to wit: cocaine, and conspiracy to possess with intent to distribute a Schedule II controlled substance to wit: cocaine.

A superseding indictment was filed on September 2, 1987. On January 9, 1989, trial commenced in the court of the Honorable Kenneth M. Hoyt, United States

District Judge for the Southern District of Texas, Houston Division. However, co-defendant Hiram Bauman appeared in court without his attorney, Randy Holzapple, who was not present due to a scheduling conflict with a trial proceeding in state court. [TR. Vol. I, 1-6, 1-7, 1-8, 1-9]. Defendant Bauman repeatedly asked for either a continuance, a severance, or to have his attorney present, and each request was subsequently denied by the Court.

Prior to the commencement of this case, the local media had given coverage to the facts concerning the case and had continued to cover the story as the voir dire proceedings began. Prospective jurors were interviewed concerning any publicity about the case which they had been exposed to. [TR. Vol. I, 1-98, 1-

111]. It was discovered that due to the media coverage, certain prospective jurors had been influenced to a certain degree in their feelings toward the Petitioner. [TR. Vol. I, 1-112, 1-113]. None of these potential jurors were chosen.

All parties were satisfied with the jury as sworn, and the jury was empaneled without objection or challenge. [TR. Vol I, 1-152, 1-153].

On January 10, 1989, opening statements were given, but not before Defendant Bauman objected to the trial going forward without this attorney being present. [TR. Vol II, 2-5]. On this date, two (2) witnesses for the Government testified and both were subjected to cross-examination by the Petitioner. Despite the dilemma facing the Court concerning Defendant Bauman, Petitioner

was aggressively moving forward with his defense.

On January 11, 1989, it came to the attention of the Court that Mr. Darryl Campbell, the attorney for co-defendants Pablo Bravo and Mario Ginoris had been arrested the day before (January 10, 1989). [TR. Vol. III, 3-3]. The Court, obviously concerned with the arrest, called a conference to determine what effect the arrest of Mr. Campbell would have on his clients as well as the trial itself. [TR. Vol. III, 3-4]. An interview was held with both Defendants Bravo and Ginoris, and the Court determined that both Defendants desired to continue with Mr. Campbell as their attorney in this trial. [TR. Vol. III, 3-16, 3-17].

The Court then sought to discover whether any of the jurors had been exposed to any news concerning the arrest of Mr. Campbell. [TR. Vol. III, 3-17]. The court determined that the jury had not been prejudiced, and that the trial should continue. [TR. Vol. III, 3-19 Excerpt p. 3].

On January 11, 1989, Bauman filed a Motion for Mistrial, Continuance, and Severance. [TR. Excerpt p. 4]. Attached to this motion was an affidavit by his attorney, Randy Holzapple. In this affidavit, Mr. Holzapple stated that he did not advise his client (Bauman) of the conflicting trial setting he had in state court. [TR. Excerpt p. 4].

The Court, now aware of the true circumstances, decided some action would have to be taken on behalf of Defendant

Bauman, and that would be to grant his Motion for Mistrial. [TR. Excerpt p. 4-5].

Petitioner expressed to the Court his objection to a mistrial, stating that a jury had been chosen, testimony had been given, and that they were satisfied with the state of the trial. Petitioner additionally requested a severance so that the trial could continue. [TR. Excerpt p. 7].

Petitioner further offered to stipulate to the bulk of the evidence, in order to shorten the length of his trial and expressly waived any later right to complain about possible prejudice. Nevertheless, the Court rejected the Petitioner's motion to sever him from Bauman and ordered a mistrial as to all parties, sua sponte.

The Court then announced its two and only reasons for the order of mistrial.

> **THE COURT:** "I think the record should reflect the reason the Court is granting the motion for mistrial of Mr. Bauman is for two reasons, and that's the only motion I will grant in this case, two reasons. First of all, Mr. Holzapple continues and still does represent Mr. Bauman but has informed the Court that he, through affidavit, that he did not inform his client that there was a conflict and that that conflict was real, and in that sense I have a problem with forcing a proceeding forward with Mr. Bauman. Even if I could appoint someone to represent him, we would still have an incompetency question to be raised relative to this particular proceeding. I am in a Catch-22 situation in that regard." [TR. Excerpt p. 19].
>
> "My opinion that the economy, for judicial economy I cannot piecemeal this case. There is no reason for me to try this case in two or three pieces of two weeks apiece when all of the evidence and all the exhibits could get lost or misplaced and we would have a one horror day, not only in this Court but if any body wants to appeal, they would not have a good record in this case, so I don't want to see that happen either." [TR. Excerpt p. 20].

The Court, after again repeating that a mistrial had been granted, stated,

> "my attitude would be that I want to try this case as one case and have it resolved as one case." [TR. Excerpt p. 23].

When the Court made it clear that the mistrial must be declared as to Bauman, the prosecutor urged a mistrial as to all defendants, so they would not have to try the case twice. [TR. Excerpt p. 8].

In open court, Petitioner objected to a mistrial being declared as to all parties, stating that he had not requested the mistrial and objected to being mistried. [TR. Excerpt p. 32].

Days later, once it was apparent that the Petitioner would move to dismiss based upon double jeopardy, the Government filed proposed findings of fact seeking to get the Court to find that the conduct of Bauman, arrest of Campbell, and the

attendant publicity had so prejudiced the jury that a fair trial would be impossible. Even though these proposed findings were in direct conflict with the evidence and earlier oral findings by the Court, the Court adopted them. The Court found that the Petitioner had been prejudiced, although the Petitioner fought against the mistrial and none of the jurors had been exposed to publicity. Petitioner's Motion to Dismiss the indictment based upon double jeopardy was denied by the Court.

Appeal to the Fifth Circuit Court of Appeals followed.

REASONS FOR REVIEW

In holding that the failure of the district court to dismiss the indictment did not twice place the Petitioner in jeopardy for the same offense, the Fifth

Circuit rendered a decision in conflict with this Honorable Court's holdings in Downum v. United States, 372 U.S. 734 (1963); United States v. Jorn, 400 U.S. 470 (1971); and Arizona v. Washington, 434 U.S. 497 (1976). See U.S. Supreme Court Rule 10(.1)(c).

The Fifth Circuit's holding also is in conflict with other Fifth Circuit decisions, and the decisions of other federal courts of appeals on the issue of whether "manifest necessity" exists to declare a mistrial. See U.S. Supreme Court Rule 10(.1)(a).

Either reason provides a compelling basis for this Court to grant the instant Petition for Writ of Certiorari.

ARGUMENT

I.

THE STANDARD OF "MANIFEST NECESSITY" IS NOT SYNONYMOUS WITH JUDICIAL ECONOMY

The Double Jeopardy clause of the Fifth Amendment protects a defendant in a criminal proceeding against repeated prosecution for the same offense. See United States v. Wilson, 420 U.S. 332 (1975). This Court has held that the question whether, under the Double Jeopardy clause, there can be a new trial after a mistrial has been declared without the defendant's consent depends on whether there was manifest necessity for the mistrial. Illinois v. Somerville, 410 U.S. 458 (1973), United States v. Jorn, supra.

The Government must show "manifest necessity" for any mistrial declared over

a defendant's objection, because the valued right to be tried before a particular tribunal is of great importance. Arizona v. Washington, supra. The standard of review on mistrial is one of "sound discretion". United States v. Jorn, supra; Arizona v. Washington, supra. In exercising "sound discretion", the trial judge must take all circumstances into account in order to determine if "manifest necessity" exists to declare a mistrial. Jorn at 487.

The district court abused its discretion by declaring a mistrial when "manifest necessity" did not exist. Instead the district court was concerned with judicial economy, so it granted a mistrial in order to avoid the additional time and expense of multiple trials.

Discretion to discharge a jury before it has reached a verdict is to be exercised only in very extraordinary and striking circumstances. Downum v. United States, 372 U.S. 734 (1963). It is apparent by the record that the district court did not apply this standard to this case.

In the present case, the Petitioner opposed the mistrial because he desired to have his fate determined by the jury that was empaneled. The trial judge did not act responsibly and deliberately in according careful consideration to Petitioner's interest in having the trial concluded in a single proceeding. See e.g. Arizona v. Washington, supra.

In exercising "sound discretion" prior to declaring a mistrial, the trial judge must consider less drastic

alternatives. See United States v. Jorn, supra.

The record is clear that there were alternatives to mistrial as to all the defendants. However, the trial court was more concerned with minimizing time and expense by desiring to have this entire matter disposed of in one proceeding.

The panel decision is contrary to the reasoning in other appellate courts, which have balanced the need for a mistrial against the rights of the defendant to proceed to trial.

The panel cited Abdi v. Georgia, 744 F.2d 1500 (11th Cir. 1984), for the proposition that there was "manifest necessity" in declaring a mistrial. In Abdi, the Court declared a mistrial after determining that the jury had been prejudiced following a deliberate action

on the part of the defense counsel in front of the jury. The instant case is clearly distinguishable from the facts in Abdi.

Further, the Fifth Circuit cited Abdi for the proposition that the decision of the trial judge deserves "great deference". Actually, the Eleventh Circuit, in Abdi, went on to say that the reasoning behind this "great deference" to be accorded is because

> "the trial judge is in a particularly good position to observe the jurors, the witnesses, and the attorney in order to evaluate the extent of this prejudice." Abdi, supra at 1503.

In the instant case, the Court, in its oral findings, found that no prejudice had occurred and none was detected. However, in its written findings, the trial court found that there was prejudice, but did not make a finding as

to who, in fact, was prejudiced. The only possible prejudice found by the trial court was its own, where the Court announced that the public perception of judicial neutrality may have been compromised.

The trial judge was not concerned with prejudice to the Petitioner, but rather the Court did not want to "piecemeal the case". Therefore, manifest necessity did not exist so the panel's decision is in conflict with the Eleventh Circuit's decision in Abdi.

In a Second Circuit case, United States v. Gaggi, 811 F.2d 47 (2nd Cir. 1987), the Court had to deal with newspaper and television publicity during the trial. The Court stated,

> "It is the impartiality of the jurors - not the quantum of publicity - that determines whether the trial proceedings may be fairly conducted. Dobbert v. Florida, 432 U.S. 282, 303

(1977). Further, while appellants correctly observe that the jurors were exposed to references that Judge Duffy had properly sought to avoid, they fail to demonstrate how these concerns were not ameliorated by the two individual voir dires. As the Supreme Court has cautioned, 'the Constitution' does not require a new trial every time a juror has been placed in a potentially compromising situation."

In Grandberry v. Bonner, 653 F.2d 1010 (5th Cir. 1981), the Fifth Circuit applied the "manifest necessity" test, and concluded that the trial judge abused its discretion in declaring a mistrial. In reference to alternatives to mistrial, the Court stated that the trial judge, after considering the record as a whole and the alternatives to mistrial, must not act in an abrupt, erratic or precipitate manner. Id. at 1014. See also United States v. Jorn, supra at 487.

In the case at bar, the trial court acted in an erratic and precipitate manner

in declaring a mistrial by not considering alternatives which would have allowed the Petitioner to proceed before the jury that was seated. The Fifth Circuit Court's decision in Grandberry is directly opposite of the decision by the trial court which was subsequently affirmed by the panel reviewing this case.

The trial court felt that judicial economy was a legitimate basis for a sua sponte declaration of mistrial. However, judicial economy is not sufficient to establish "manifest necessity".

II.

PREJUDICE DOES NOT CREATE "MANIFEST NECESSITY" WHERE PETITIONER WAIVES PREJUDICE OR THE JURY IS INSTRUCTED TO DISREGARD

The controversy surrounding the mistrial in this case centers upon the premise that the Petitioner has been prejudiced due to publicity, the alleged

courtroom antics of Bauman, and the arrest of Lawyer Campbell.

The Fifth Circuit has previously considered the effects of prejudicial remarks and outbursts before juries. In United States v. Klein, 546 F.2d 1259 (5th Cir. 1977), the Court held that only where the remark is so highly prejudicial that it can not be cured by the Court's admonition, is the instruction considered insufficient. Id. at 1263.

The conduct of Bauman or Lawyer Campbell was not so prejudicial that an instruction could not have sufficed. In United States v. Stotts, 792 F.2d 318 (5th Cir. 1986), the co-defendants urged that the trial court erred in denying a motion for mistrial made after Stotts had created a courtroom disturbance. The Court found there was no error for two reasons:

"First, the record discloses that no

> motion for mistrial was made by the co-defendants. Second, any possible prejudice to the co-defendants was cured when the judge instructed the jury to disregard the incident following the outburst." 792 F.2d at 322.

In the instant case, the record is clear that Petitioner never moved for a mistrial, rather, he objected on numerous occasions. Additionally, any possible prejudice would have been cured by an instruction to the jury. The trial court's decision is therefore in conflict with the law of the Fifth Circuit.

Had Petitioner been prejudiced in any way, the Petitioner effectively waived any such prejudice. It is elementary that a party can effect a waiver by intentionally waiving possible error or by failing to timely object. The panel ruled contrary to this notion by holding that the Petitioner had no such right of waiver.

The panel's opinion in this case is in direct conflict with the holding in United States v. Evers, 569 F.2d 876 (5th Cir. 1978).

In the Evers opinion, the Court acknowledged the same principles announced by the panel in this case, i.e. that there is not an abuse of discretion simply because the trial court "could have taken another alternative course to a mistrial". The Court then added:

> "It does not, however, mean the trial judge's decision to declare a mistrial is absolute so long as he carefully considers and rejects available alternatives. Appellate review of decisions affecting rights so fundamental as the right not be twice placed in jeopardy cannot be limited merely to ascertaining whether the trial judge went through the ritual of rejecting alternatives to mistrial.
>
> The issue here involves more than mere choice of suitable alternatives. Here the mistrial was declared for defendant's benefit, but over his relevant opposition. . . . In this case, defendant expressly disclaimed

> any interest in a mistrial. He explicitly stated he wished to have his fate decided by the jury first empaneled and to avoid the 'anxiety and heartbreak of another trial', the very concern with which double jeopardy deals. See Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977)."

The Fifth Circuit reversed the district court's ruling in Evers and dismissed the indictment. There is no reported case which so strongly parallels the instant case as Evers. In both, the Appellant vehemently opposed a mistrial, however, the district court granted the mistrial ostensibly for the benefit of the defendant. The defendant is always free to waive his right to complain about possible prejudice and should be free to see his trial concluded. Accordingly, the panel opinion in the instant case is in direct conflict with the Fifth Circuit Court's prior holding in United States v.

Evers, supra.

III.

STRICT SCRUTINY REQUIRES A COMPARATIVE ANALYSIS BETWEEN THE EVIDENCE IN THE RECORD AND THE EXERCISE OF DISCRETION IN DECLARING A MISTRIAL SUA SPONTE

The Fifth Circuit, in the panel opinion, found that the trial judge did not abuse his discretion in declaring a mistrial over the objections of Petitioner. The panel recognized that they are not bound by the findings of fact, but may also consider the record as a whole. Grandberry v. Bonner, supra.

Indeed, strict scrutiny requires a comparative analysis of the record with the findings.

Strict scrutiny requires that the reviewing court reject the findings that have no support in the record. An example of such unsupported findings is the

assertion that the Petitioner had been prejudiced.

When the trial court attempts to explain the rational for its decision, it may not disregard the facts and evidence in the record.

> "Reprosecution is permissible where, before declaring a mistrial, the district court justifiably concludes that it is impossible for [the jury], in considering the case, to act with the independence and freedom. . . requisite to a fair trial of the issues." United States v. Starling, 571 F.2d 943 (5th Circ. 1978) citing Simmons v. United States, 142 U.S. 148, 12 S.Ct. 171 at 172 (1891).

The Fifth Circuit in Starling held that the district court is not obligated to conduct an inquiry to determine the total extent of the prejudice, however, when the Court conducts such an inquiry it may not ignore its findings. To do so would result in an abuse of discretion.

In Grandberry v. Bonner, supra, the Fifth Circuit examined not only the findings by the trial court but carefully considered the record as a whole.

In the instant case, it is obvious that the trial court based its true findings of fact on the issue of judicial economy and without a consideration of double jeopardy consequences or the manifest necessity standard. The record further shows that while the trial judge briefly considered alternatives, i.e.: severance, that it failed to consider the alternatives in relation to the right to not be tried twice compared to the desire to not tax the resources of the Court twice.

Looking beyond the findings of fact and into the record indicates that the mistrial was granted without carefully

considering and utilizing less drastic alternatives as in United States v.Jorn, supra.

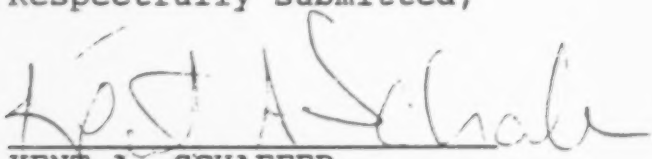
Here, the trial court considered the alternative of severance, but found that it did not want to try the case twice. This analysis put the policy considerations of the Court over and above the constitutional rights of the Petitioner. To this extent, the panel decision is in conflict with this Honorable Court's decision in United States v. Jorn, 400 U.S. 470 (1971) and the Fifth Circuit's decision in Grandberry v. Bonner, 653 F.2d 101 (5th Cir. 1981).

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully submits that this Honorable Court should grant this Petition for Writ of Certiorari, reverse the

judgment of the Fifth Circuit Court of Appeals and order that reprosecution of Petitioner be barred because of Petitioner's fundamental right against double jeopardy.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that the an original and forty (40) copies of the foregoing Petition for Writ of Certiorari and its Appendix was delivered by the undersigned to the United States Supreme Court on the 22nd day of January, 1990. I also certify that true copies of the foregoing Petition of Writ of Certiorari was mailed to the

following parties, via United States mail:

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KENT A. SCHAFFER

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2176

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HIRAM LEE BAUMAN,
PEDRO TALAMAS and
JOHN CARY,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

---

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion October 20, 5 Cir., 1989, _____ F.2d _____)

(November 21, 1989)

Before DAVIS and SMITH, Circuit Judges, and LITTLE, District Judge.*

PER CURIAM:

(✓) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are denied. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and

Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

*District Judge of the Western District of Louisiana, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-2176

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HIRAM LEE BAUMAN, PEDRO TALAMAS, and JOHN CARY

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

---

(October 20, 1989)

Before DAVIS and SMITH, Circuit Judges, and LITTLE, District Judge.[1]

JERRY E. SMITH, Circuit Judge:

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[1] District Judge of the Western District of Louisiana, sitting by designation.

Three defendants seek dismissal of an indictment pending against them after the trial court declared a mistrial. Since all defendants were once put in jeopardy, we must decide whether the fifth amendment to the Constitution bars reprosecution under the facts of this case.

Upon review of the entire record, we conclude that the trial court did not exceed its discretion in finding "manifest necessity" for a mistrial. Accordingly, the double jeopardy clause does not constitutionally bar reprosecution over the defendants' objection, and hence we affirm. A retrial may commence with respect to all defendants.

I.

The appellants and several confederates were indicted on April 15, 1987, for a variety of drug-related

conspiracy, distribution, and importation offenses. The events surrounding the trial were well publicized, described by the Houston media as the largest drug trial in the city's history. The district judge decided to try all defendants together and set a trial date well in advance to avoid scheduling conflicts commonly associated with trying numerous co-defendants.

Defendant Hiram Lee Bauman, himself an attorney, was proved court-appointed counsel. Problems developed between Bauman and his attorney, however, leading to substitution of appointed counsel on two separate occasions. The district court permitted Bauman to retain attorney Randy Holzapple, his third appointed counsel, several weeks before trial, with the understanding that the trial date of

January 9, 1989, would not be continued. Bauman accepted this condition for substitution of counsel.[2]

All defendants appeared in court on the trial date. Because of a so-called "scheduling conflict," however, Holzapple failed to appear. The district court believed, based upon these events, that Bauman had retained Holzapple with full knowledge of the attorney's scheduling problem in order to stall the commencement of the trial. The district court offered Bauman the immediate services of his

---

[2] In his December 19, 1988, motion to substitute counsel, Bauman stated, "This motion is not made for the purpose of delay and there is sufficient time before trial for substitution of counsel and no injustice, prejudice, or obstruction of court procedure will be caused by the substitution." The court granted the substitution, subject to the limitation that "[t]his order shall not become a basis for a continuance in this case."

second court-appointed attorney, who was present in court for unrelated reasons, so that the trial could proceed. Bauman rejected the court's invitation and moved that either the case be continued or he be severed.

Sensing bad faith, the district court interpreted Bauman's actions as a calculated attempt to disrupt the trial. Accordingly, the court rejected Bauman's motion for a continuance or a severance and proceeded with the trial in the absence of Bauman's defense counsel, citing this court's decision in United States v. Mitchell.[3] Bauman vehemently

---

[3] 777 F.2d 248, 257-58 (5th Cir. 1985), cert. denied, 476 U.S. 1184 (1986), holding that a trial may proceed without defense counsel if the defendant, in bad faith, retains counsel with a scheduling conflict. The Mitchell court concluded that the right to counsel may be waived if it is purposefully used as an instrument for delay.

objected to the proceedings, believing himself unrepresented in violation of the sixth amendment. He raised the objection at every available opportunity, even though the court noted his objection for purposes of appeal and requested Bauman's cooperation.

A jury was empaneled and sworn, and the government began to present witnesses. Bauman, however, proved to be a disruptive defendant. Against the instructions of the court, he repeatedly objected to the lack of counsel before the jury and saw fit to interrupt the examination of government witnesses by seeking the court's permission to leave the courtroom.

Two days after trial began, Bauman moved for a mistrial, continuance, or severance based upon a newly-submitted affidavit from Holzapple stating that

Bauman was unaware of this scheduling conflict. That same morning, the court received information that attorney Campbell, counsel for two other co-defendants, was arrested in an unrelated case on charges of conspiring to bribe a justice of the peace and aggravated perjury.

The judge decided to meet with the defendants' attorneys to address the separate problems associated with Bauman's lack of counsel and Campbell's arrest. The defendants offered the court no uniform curative measure for any prejudice that they may have suffered: Campbell moved for a mistrial with respect to his two clients; several other co-defendants sought a mistrial; Bauman desired either a continuance, severance, or "as his last resort," a mistrial; defendants Talamas

and Cary lobbied for a severance, but opposed a mistrial. The government, not surprisingly, wanted to try all defendants together and thus sought a mistrial to correct any sixth-amendment error or incurable prejudice visited upon the jury.

Before deciding upon a course of action, the district court then interviewed the jurors to assess any possible prejudicial exposure to news coverage. Prudently, the court made no direct reference to Campbell's arrest so as not to exacerbate any problem with jury bias. At this point in the proceedings, three jurors admitted to hearing media references to the trial, but they apparently had not paid attention to any details.

After interviewing the attorneys and jurors, and over the objection of Talamas

and Cary, the judge declared a mistrial sua sponte as to all defendants. An order, coupled with more comprehensive written findings, was subsequently entered on January 26, 1989. The court found, inter alia, that Holzapple had known he had a scheduling conflict when he accepted representation of Bauman and had failed, in bad faith, to notify the court and to attend the trial on behalf of Bauman. The court was also concerned that past publicity, coupled with expected future media coverage of Campbell's arrest, would incurably prejudice all defendants.

After declaration of the mistrial, defendants Bauman, Talamas, and Cary unsuccessfully moved to dismiss the indictment on the theory that reprosecution is constitutionally barred. A retrial of all defendants has been

stayed pending disposition of this interlocutory appeal.

II.

A.

The double jeopardy clause protects a defendant's "valued right to have his trial completed by a particular tribunal." Crist v. Bretz, 437 U.S. 28, 36 (1978). It also bars abusive government conduct designed to harass a defendant through repetitive prosection or undertaken for the purpose of increasing the likelihood of conviction.[4]

However, the double jeopardy clause is not an absolute bar to reprosecution once the jury has been empaneled and

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[4] See Arizona v. Washington, 434 U.S. 497, 503-04 (1978) (retrial increases the financial and emotional burden on the accused, prolongs the stigma associated with unresolved charges, and increases the risk that an innocent person may be convicted).

sworn. A defendant may, for example, waive double jeopardy protection be consenting to a mistrial before a verdict is rendered. As noted in United States v. Dinitz, 424 U.S. 600, 607 (1976), "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error" (citing United States v. Jorn, 400 U.S. 470, 485 (1971)).

Without the defendant's consent to a mistrial, reprosecution becomes more difficult. Nevertheless, a retrial following a sua sponte declaration of mistrial over a defendant's objection is not prohibited under the fifth amendment where there exists "manifest necessity" for a mistrial. Id. at 606-07. The "manifest necessity" exception, although

narrow, frees the trial judge from the "Hobson's Choice" of either continuing with a trial that in fairness should be terminated, or declaring a mistrial after jeopardy attaches and reprosecution is barred. See, e.g., Cherry v. Director, State Bd. of Corrections, 635 F.2d 414, 419 (5th Cir. Jan. 1981) (en banc) (manifest necessity for mistrial exists when, for example, judge or juror cannot attend because of illness or death), cert. denied, 454 U.S. 840 (1981).

B.

For purposes of appellate review, the trial court's finding of "manifest necessity" for a sua sponte declaration of mistrial is to be upheld if the court exercised "sound discretion" in making that determination. See Arizona v. Washington, 434 U.S. at 514; Grandberry v.

Bonner, 653 F.2d 1010, 1014 (5th Cir. Unit A Aug. 1981). Application of this standard requires appellate ocurts to give the judge's mistrial order the "highest degree of respect," as he is most familiar with the events that compromised the trial.[5] The availability of alternatives less draconian than a mistrial does not necessarily preclude reprosecution, as reasonable judges may differ concerning proper curative measures. Grandberry, 653 F.2d at 1014; Cherry, 635 F.2d at 418-19.

Additionally, we are free to scrutinize the entire record and are not limited to only those findings made

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[5] Grooms v. Wainwright, 610 F.2d 344, 346 (5th Cir.), cert. denied, 445 U.S. 953 (1980); see also Abdi v. Georgia, 744 F.2d 1500, 1503 (11th Cir. 1984) (where grounds for mistrial involve jury prejudice, decision of trial judge deserves "great deference"), cert. denied, 471 U.S. 1006 (1985).

contemporaneously with the mistrial order. See Abdi, 744 F.2d at 1503. This plenary review of the record assists us in determining, as required by our prior decisions, whether the trial judge "carefully considered the alternatives and did not act in an abrupt, erratic or precipitate manner." Grandberry, 653 F.2d at 1014.

III.

A.

The Supreme Court has said that the valued right to be tried before a particular tribunal "is sometime subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." Arizona v. Washington, 434 U.S. at 505. However, because the valued right is so important, the

government must show "manifest necessity" for any mistrial declared over a defendant's objection. Id.; Baker v. Estelle, 711 F.2d 44, 47 (5th Cir. 1983), cert. denied, 464 U.S. 1048 (1984).[6]

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[6] We have similarly stated the law on double jeopardy:

> The bar of the double jeopardy clause operates to protect an accused against multiple prosecutions or multiple punishments for the same offense. Jeopardy attaches at the empaneling and swearing in of the jury, and from then on, consideration must be given to the defendant's 'valued right. . . to have his trial completed by the particular tribunal summoned to sit in judgment on him.' When that right is denied by declaration of a mistrial at the behest of the prosecution or on the court's own motion, reprosecution is prohibited unless there is a 'manifest necessity for the [mistrial] or the ends of public justice would otherwise be defeated.'

United States v. Bobo, 586 F.2d 355, 362 (5th Cir. 1978) (citations omitted), cert. denied, 440 U.S. 976 (1979).

In Arizona v. Washington, the Supreme Court declined to define manifest necessity precisely or to enunciate rules of mechanical application.[7] It offered limited guidance, saying only that the "high degree of necessity" mandated by the phrase can be found in a variety of circumstances. See 434 U.S. at 506-09. Thus, the Court left the definition of the phrase deliberately ambiguous, affording the trial judge considerable discretion to declare a mistrial without immunizing a defendant from reprosecution.

The phrase "manifest necessity,"

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[7] "[It is] readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide." Arizona v. Washington, 434 U.S. at 505 n. 16 (citing Jorn, 400 U.S. at 480).

first used in double jeopardy jurisprudence in United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824), has over the years been judicially refined to such an extent that it is today somewhat misleading: It implies a greater burden on the government than is actually demanded to achieve a reprosecution after a mistrial. As the Washington Court noted "indeed, it is manifest that the key word 'necessity' cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." 434 U.S. at 506. Thus, manifest necessity, in modern legal jargon, is equivalent to "a high

degree of necessity."[8]

B.

In the instant case, the court and defendants expressed considerable concern over "spillover prejudice" if the defendants were forced to associate with Campbell, recently arrested, and his clients. In addition, all parties agree that Bauman conducted himself in open court in a fashion that frustrated both the judge and the defendants in maintaining order at trial. The

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[8] We note that the trial judge need not make an express finding of "manifest necessity," nor must he expressly state that he considered alternatives and found none to be superior. See Washington, 434 U.S. at 501; Abdi, 744 F.2d at 1053. We need only to be satisfied from the complete record that the trial judge exercised sound discretion in declaring a mistrial, sua sponte, in a factual setting that demonstrates a high degree of necessity for terminating the trial before the jury competes its solemn task of rendering a verdict.

defendants feared that Bauman's poor decorum before the jury would have a negative impact upon all of them.

It is apparent from the record that the trial court was concerned about the possibility of a sixth amendment error if the trial had proceeded in the absence of defense counsel for Bauman. The court at first believed that Bauman had sought deliberately to interrupt the progress of the trial by soliciting the absence of Holzapple when the trial date had been agreed to by all parties. However, Holzapple's affidavit, if true, indicated that Bauman had not retained his services in bad faith in order to disrupt the trial.

Aside from problems with representation, the judge and the remaining defendants found Bauman's

interruptions and repetitious objections to be potentially prejudicial as to all defendants. This spillover prejudice was exacerbated by widespread news reports of Campbell's arrest. The judge found that the risk of both past and future exposure -- through news reports and juror conversations with friends -- was sufficient to merit a mistrial.

With little difficulty, we conclude that Bauman's double jeopardy appeal is without merit in this case for the simple reason that he requested the mistrial. As noted previously, a motion by a defendant for a mistrial usually removes any barrier standing in the way of reprosecution under Dinitz. His argument that his motion for a mistrial was "a last resort" and that he really wanted a severance or a continuance is unpersuasive.

The double jeopardy defense asserted by Talamas and Cary, however, is not meritless, as the consistently objected to a mistrial. They remind us that they even agreed to stipulate to certain government evidence in order to avoid a mistrial as to them. Moreover, Talamas and Carry argue that United States v. Jorn, 400 U.S. 470 (1971), requires that the district court consider less drastic alternatives and, if possible, to choose a remedy of severance instead. They allege that the judge declared a complete mistrial because of selfish concerns for "judicial economy" in conducting a single trial, and that such considerations have no place in double jeopardy jurisprudence.

We agree with Talamas and Cary to the extent that they understand Jorn to require the trial court methodically to

consider alternatives to a mistrial. However, we reject their argument that the trial court must always agree to sever certain defendants if possible. As noted before, reasonable judges may differ on the proper curative measure, and appellate courts are not meant to second-guess the sound discretion of the trial judge in declaring a mistrial for juror prejudice when that judge is closest to the compromising events.

Moreover, we disagree with defendants' suggestion that the trial judge was concerned solely with judicial efficiency when he terminated the trial. The record reflects that much more was involved. The trial judge expressed concern that bifurcated trials could prejudice subsequent proceedings because of the publicity surrounding this large-

scale drug trial. He also feared incurable juror bias resulting from Bauman's disruptions in front of the current panel. The future impact of Campbell's arrest, about which the jurors were asked only indirectly, was also speculative and thus entitled to great deference.

It is evident to us that the trial court here did not act in an abrupt, erratic, or precipitate manner. He consulted with the counsel of all defendants: Most wanted a mistrial for their clients; all wanted a mistrial with respect to Bauman; no one wanted to be seen with Campbell; and Talamas and Cary wanted a severance only. The court also interviewed all the jurors to assess the extent of juror bias.

The court proceeded to consider the options of a continuance and severance. Contrary to the suggestion of the defendants, his findings concerning alternatives other than a mistrial need not be limited to those contemporaneously made with his mistrial order. In fact, such findings need not even be made expressly. See Abdi, 744 F.2d at 1503 (record need only effect that alternatives were considered). Nevertheless, in this case the trial court did in fact enter additional findings, along with his written order, two weeks later. He concluded that a continuance would only expose the empaneled jurors, over the course of a month's delay, to more prejudicial media influence. A severance was similarly rejected because of the fear of incurable prejudice on the part of the

current panel, concerns for judicial economy and preservation of evidence, and the express consent of all but two of the defendants for a mistrial.

The fact that the judge's subsequent written findings may have been inconsistent, in whole or in part, with earlier oral findings, as the defendants suggest, is a matter to be considered upon review.[9] We recognize, however, that such changes may be attributable to the judge's access to more information over time or his quite reflection upon the unusual events that transpired before him here.

Contrary to what the defendants suggest, double jeopardy jurisprudence

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[9] Defendants Talamas and Cary remind us that the judge found no prejudicial bias when he interviewed the jurors but that he did find such bias, or the threat thereof, in subsequent written findings.

does not bar a judge's reassessment of the impact of certain events. Unless we are convinced from our review of the record that the trial judge is belatedly searching for manifest necessity where none existed at the trial's termination, we find no interest to be served by shielding criminal defendants from reprosecution because of a judge's fortuitous choice of words. Thus, the proper analysis focuses upon the complete record and not upon isolated statements of the presiding judge.

IV.

We recognize that other judges may have dispensed differently with the problems presented at trial in the instant case. Nevertheless, we conclude that the trial judge did not abuse his discretion in declaring a mistrial over the objection

of two defendants here. Bauman's lack of counsel and his bizarre behavior before the jury, coupled with Campbell's arrest, was sufficiently prejudicial as to all defendants. The decision to terminate the trial could have been reached similarly by any reasonable judge.

We are satisfied from our review of the record that a high degree of necessity existed for a complete mistrial. We find that the court evaluated, with due deliberation, whether a mistrial or some other curative measure was appropriate. Accordingly, we AFFIRM. A retrial may proceed with respect to all defendants.

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CRIMINAL ACTION
	§	NO. H-87-93-S
PEDRO TALAMAS, (3)	§	
JOHN CARY, (5)	§	
PEDRO DEVIA, (6)	§	
OSCAR OLIVIA, (10)	§	
JULIO MACEO, a/k/a	§	
EL FLACO, (11)	§	
PABLO BRAVO, (13)	§	
HIRAM LEE	§	
BAUMAN, (15)	§	
MARIO GINORIS, (17)	§	
	§	
Defendants.	§	

ORDER GRANTING MISTRIAL

BACKGROUND

A trial by jury commenced in this cause on January 9, 1989 with selection of the jurors. The Government began to put

on its evidence on January 10. Several events occurred, with two specific events occurring on January 11, leading to the Court's opinion that a mistrial should be granted. Beginning with the first day of trial, January 9, the two major daily newspapers carried prominent items each day about this trial. Comments by defense attorneys and one defendant were included in these items.

On the morning of January 11, 1989, Darryl Campbell, attorney for defendants Pablo Bravo and Mario Ginoris, appeared in Chambers and informed the Court that he believed that he would not be able to proceed in the trial, although he personally was ready. On January 10th, Attorney Campbell was arrested by State authorities on an indictment charging conspiracy to commit bribe and aggravated

perjury. Attorney Campbell requested that the Court employ special counsel to inquire of his clients, Bravo and Ginoris, whether they could proceed with him in light of his arrest. After calling all defense counsel to Chambers and informing them of this dilemma, the Court proceeded to employ special counsel H. Michael Sokolow from the Federal Public Defender's Office to interview defendants Bravo and Ginoris concerning their desire for new counsel and lay opinion regarding proceeding to trial with the current jury.

Following these interviews, the Court determined that limited questioning of the jury was appropriate in light of the fact that both major daily newspapers carried a headline story on Attorney Campbell's arrest and additionally linked him to the case on trial.

Also on January 11, 1989, Attorney Randy Holzapple filed a motion for mistrial and/or severance, stating by affidavit that he, Randy Holzapple, had failed to inform his client, Hiram Lee Bauman, that he had a conflict in trial schedule at the time that he agreed to represent him on or about December 16, 1988. Defendant Hiram Lee Bauman had repeatedly objected to proceedings and accused the Court of depriving him of his right to counsel. This conduct occurred during voir dire, at the time of opening statements, and on numerous occasions at side bar conferences. The objections were generally made in the presence of the jury panel.

FINDINGS OF FACTS

1. The Court finds that Attorney Holzapple knew that he had a conflict upon

taking the case; knew that the Court would not grant a continuance based on his appointment to represent defendant Bauman; and after announcing ready for trial on January 3, 1989, failed to arrange for other counsel to be present for defendant Bauman.

The Court further finds that Attorney Holzapple's conduct was intentional and coupled with defendant Bauman's conduct in Court was designed to prejudice the jury and to undermine the public's perception of judicial neutrality. The Court's observations are reflected by defendant Bauman's and Attorney Holzapple's complaints, published in the Houston Post and Houston Chronicle on the second day of trial. (See attachments A and B to these findings and conclusions). In these articles Attorney Holzapple is quoted

criticizing this Court, and suggesting that this Court was responsible for the attorney's failure to appear for trial and asserting further that defendant Bauman was not being afforded a fair trial by this Court. (See attachment B.) The Court's findings are further reflected in other publicity surrounding this case. Kent Schaffer, attorney for defendant John Cary is quoted in a January 10, 1989, Houston Chronicle article expressing his concern that defendant Bauman's lack of an attorney would have a "spill over" effect which would prejudice the other defendants.

2. Although widespread publicity concerning prominent cases cannot be permitted to stop the wheels of the criminal justice system, the publicity must be examined and weighed for inherent

prejudicial effect.

This trial was covered by the two daily local newspapers, at least two of the local television stations, and at least two of the local radio stations. The newspaper articles discuss the nature of what the testimony will show, the status of codefendants not on trial, and comments by defense attorneys. The articles are not always factually correct. The Court finds that, given the nature of the information published, the fact that the information was published during the trial, the sources for the information are often anonymous, and the pervasiveness of the publicity, it was very likely that this information could have reached jurors through comments made to them by family or friends. A further front-page story appeared in the Houston Chronicle four

days after the mistrial was declared.

3. The Court finds that the danger of prejudice from the widely publicized arrest of Attorney Campbell pervades the defense of each of the defendants.

The news accounts noted prominently that attorney Campbell had encountered his clients in the jail cell where he was taken after his arrest. This fact was verified by the Court through special counsel appointed to make the inquiry. The Court's concern with prejudice was underscored by the remarks of Attorney Kent Schaffer who, in violation of the Court's order, stated his view to reporters that the news of the arrest of attorney Campbell could "devastate" the rights of all defendants in the eyes of the jury.

4. The Court met with all defense counsel in open court to rule upon all motions for severance and for mistrial. During these proceedings Attorney Frank M. Rubino, attorney for defendant Pedro Talamas, and Kent Schaffer, attorney for John Cary, informed the Court that they intended to move for mistrial if the Court did not, with respect to Defendants Bravo, Ginoris, and Bauman, either grant a motion for severance or grant a motion for mistrial. Mr. Rubino was emphatic in this respect. Mr. Rubino stated: "Mr. Talamas does not wish to go forward in the same courtroom, most respectfully, with Mr. Campbell because of what we can see to be a continuing problem, a time bomb that we don't know when or if it could go off."

Attorney Campbell moved for severance or mistrial as to Bravo and Ginoris

because he believed that the jury would eventually learn of his problem and hold this against his clients.

Mrs. Nancy Harrison, attorney for defendant Devia, moved for mistrial asserting that the prejudice as to defendant Devia had already occurred. The Harrison motion was joined by Attorney Lee Wilson representing defendant Oscar Olivia and John Garcia, representing Julio Maceo.

5. The Court finds that the alternatives to mistrial i.e., continuance or severance, would not adequately cure the prejudice which permeated the trial but in fact would create additional prejudice. A protracted continuance, allowing new counsel to become prepared for trial, carries the substantial risk of further prejudice to this jury resulting from continuing extensive media coverage.

Severance would not cure the taint to this jury occasioned by the pervasive publicity of prejudicial matters, i.e., courtroom misconduct by defendant Bauman and the arrest of Attorney Campbell.

CONCLUSIONS OF LAW

1. The attack on the Court's conduct of the trial and it impartiality, along with the conduct of Attorneys Holzapple and Schaffer in making statements in the press designed either to insure that no fair trial occurred or to point out the difficulty of insuring a fair trial coupled with the publicized arrest of the attorney for defendants Ginoris and Bravo requires entry of an order of continuance, severance, or mistrial. The Court is required to select the least drastic alternative. See U.S. v. Jorn, 400 U.S. 470 (1971); U.S. v.

Thompson, 744 F.2d 1065, 1068 (4th Cir. 1984).

2. A continuance carries a risk of prejudice in that a least a 30-day continuance would be required. Prejudice may be presumed where there has been highly inflammatory publicity or intensive media coverage. Bronstein v. Wainwright, 646 F.2d 1048, 1051 (5th Cir. 1981). See also Murphy v. Florida, 421 U.S. 794, 798-99 (1975). During a continuance, a juror could be exposed to persons who have rad the press coverage of this case and who discuss the coverage in the juror's presence. This Court concludes that the publicity attached to this trial was both inherently prejudicial and extensive; therefore, to grant a continuance would carry the taint with the trial.

3. Defendants Talamas, Cary, Devia, Bravo, Bauman, and Ginoris are charged in two conspiracy counts. Each is charged with conspiring with the other or unknown parties to import and to possess with intent to distribute large quantities of cocaine.

Granting a severance and proceeding to trial on the conspiracy counts as to part of the defendants would prejudice those parties severed, specifically Bauman, Bravo, Ginoris, Olivia, and Devia. Defendants Talamas and Cary, although strenously urging severance and objecting to mistrial, did not make a showing of compelling prejudice that would result from the denial of the requests for severance. U.S. v. Horton, 646 F.2d 181, 186 (5th Cir. 1981). In fact, the widespread publicity about this case would

taint the trial of the severed defendants and would be prejudicial to both defendants and prosecutors.

4. The Court's order of mistrial as to all defendants is premised in significant part on its concern for (a) the prejudice on bifurcating the conspiracy counts; (b) the prejudice to defendant Bauman after his attorney Holzapple revealed on January 11, 1989 that he failed to inform defendant Bauman that he could not be available for trial; (c) the efforts by Attorney Holzapple and defendant Bauman to undermine the jury's and public's perception of the Court's neutrality in the trial; (d) the violation of the Court's order by defense counsel Schaffer in discussing aspects of the case with the press; (e) the likelihood of continuing publicity concerning Darryl

Campbell and his arrest, resulting in a substantial risk that the jury would be prejudiced by the extensive media coverage; and (f) the response of Bravo that while he wanted Attorney Campbell to continue representing him, he felt that the jury did or would eventually know and use it against him.

5. Although the motion for mistrial of Attorney Holzapple was granted, the order of mistrial as to all defendants is required to insure that each defendant receives a fair and impartial trial, to insure that judicial resources are used wisely, and to correct any taint or prejudice that pervaded the trial. These matters could not be corrected through a continuance or severance. In fact, these matters would have been exacerbated by a continuance or severance. Finally, it is

well established that in conspiracy cases persons jointly indicted should ordinarily be tried together. U.S. v. Perez, 489 F.2d 51, 65 (5th Cir. 1973), cert. denied, 417 U.S. 945 (19744). It is the conclusion of this Court that this view should prevail under the circumstances presented in this case.

SIGNED this 26th day of January, 1989.

/s/ Kenneth Hoyt
KENNETH HOYT
United States
District Judge